

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc.
SIXTH DIVISION**

DISTRICT COURT

George Vourvachakis :
 :
v. : **A.A. No. 13 - 192**
 :
Department of Labor & Training, :
Board of Review :

ORDER

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED, that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 19th day of February, 2014.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
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George Vourvachakis :
v. : A.A. No. 2013 – 192
Department of Labor and Training, :
Board of Review :

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Mr. George Vourvachakis urges that the Board of Review of the Department of Labor and Training erred when it decided he was ineligible to receive unemployment benefits. Jurisdiction for appeals from the Department of Labor and Training Board of Review is vested in the District Court pursuant to Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to General Laws 1956 § 8-8-8.1. After a review of the entire record, I find that a fair and proper application of the Employment Security Act to Mr. Vourvachakis' circumstances requires that he be found ineligible to receive unemployment

benefits. I therefore recommend that the decision of the Board finding Claimant ineligible be AFFIRMED.

FACTS & TRAVEL OF THE CASE

While the factual circumstances of Mr. Vourvachakis's claim are fairly straightforward, the legal issues are somewhat convoluted. I will endeavor to unravel this knot before undertaking my analysis of the legal questions posed.

Claimant was working for CVS until January 10, 2012 — when he was injured at work. As a result of his injuries he received worker's compensation benefits. His rehabilitation ended in September of 2012 but he was not medically cleared to return to work until May of 2013. All parties agree that his job was unavailable when he was medically released to work. Without a job to return to, he filed a claim for unemployment benefits on June 16, 2013. But, on August 9, 2013, the Director declined to backdate the claim, finding that he was not eligible for reinstatement under section 28-33-47 of the Worker's Compensation law, which is cross-referenced in subsection 28-42-3(3). See Director's Decision, August 9, 2013, Department's Exhibit No. 2. Because his base year was not backdated and because he had no income in the base period that was used, he was again declared monetarily ineligible.

Mr. Vourvachakis appealed and a hearing was held before Referee John

Palangio on September 17, 2013. Mr. Vourvachakis was the sole witness at the hearing — neither the Department nor his employer was represented. But on September 17, 2013, the Referee ruled that Claimant was ineligible to have his base year backdated because, under subsection 28-33-47, he was not entitled to reinstatement because his right to reinstatement terminated one year from the date of injury. Since Mr. Vourvachakis was injured in January of 2012 but not released to work until May of 2013, Referee Palangio decided he had no right to reinstatement and was, as a result, not entitled to have his base year backdated.

An appeal was taken and the Board of Review summarily affirmed the Referee's ruling in a decision dated October 23, 2013. Mr. Vourvachakis filed a Petition within the Sixth Division District Court on November 14, 2013.

STANDARD OF REVIEW

The standard of review which this Court must employ is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

42-35-15. Judicial review of contested cases.

* * *

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because

the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court “* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are ‘clearly erroneous.’”¹ The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.² Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.³

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d

¹ Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

² Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

³ Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

595, 597 (1964) that a liberal interpretation shall be utilized in construing the Employment Security Act:

*** eligibility for benefits is to be determined in the light of the expressed legislative policy that “Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family.” G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

APPLICABLE LAW

Two provisions of the Rhode Island General Laws are especially pertinent to the proper resolution of this case. The first is found in the Employment Security Act; the second is a section of Rhode Island’s Worker’s Compensation law.

1. Definition of “Base Period.”

The second statute we must consider is subsection 28-42-3(3). The provision defines the term “base period” which, as we noted, is referenced in section 11:

28-42-3. Definitions. — The following words and phrases, as used in chapters 42 -- 44 of this title, have the following meanings unless the context clearly requires otherwise:

* * *

(3) "Base period", with respect to an individual's benefit year means the first four (4) of the most recently completed five (5) calendar quarters immediately preceding the first day of an individual's benefit year. For any individual's benefit year and for any individual deemed monetarily ineligible for benefits for the "base period" as defined in this subdivision, the department shall make a re-determination of entitlement based upon the alternate base period which consists of the last four (4) completed calendar quarters immediately preceding the first day of the claimant's benefit year. Notwithstanding anything contained to the contrary in this subdivision, the base period shall not include any calendar quarter previously used to establish a valid claim for benefits; provided, that notwithstanding any provision of chapters 42 -- 44 of this title to the contrary, for the benefit years beginning on or after October 4, 1992, whenever an individual who has received workers' compensation benefits is entitled to reinstatement under § 28-33-47, but the position to which reinstatement is sought does not exist or is not available, the individual's base period shall be determined as if the individual filed for benefits on the date of the injury; * * *. (Emphasis added)

Thus, the basic definition of base period furnished in subsection 28-42-3(3) is — the first four of the five most recent calendar quarters preceding the start of receiving benefits; alternatively, it may be the most recent four calendar quarters prior to the receipt of benefits. But, a specific provision of the definition encompasses the scenario in which a worker files a claim for unemployment benefits after having previously collected workers' compensation. The definition's final sentence [emphasized above], provides that when a person

who has been receiving worker's compensation benefits attempts to return to work — but his or her position is unavailable — the base period may be set back to the date of the injury. Of course, if this is done, a claimant will often become monetarily eligible to receive benefits. We shall now examine this provision in greater detail.

2. Limitations on the Right to Reinstatement.

The final provision of the Employment Security Act which illuminates this controversy is section 28-33-47, which provides, in pertinent part:

28-33-47. Reinstatement of injured worker. — (a) A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon written demand for reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of the position with reasonable accommodation made by the employer in the manner in which the work is to be performed. A workers' former position is "available" even if that position has been filled by a replacement while the injured worker was absent as a result of the worker's compensable injury. If the former position is not available, the worker shall be reinstated in any other existing position that is vacant and suitable. A certificate by a treating physician that the physician approved the worker's return to the worker's regular employment or other suitable employment shall be prima facie evidence that the worker is able to perform the duties.

(b) * * *.

(c) Notwithstanding subsection (a) of this section:

(1) The right to reinstatement to the worker's former position under this section terminates upon any of the following:

(i) * * * ;

(ii) * * * ;

- (iii) * * * ;
- (iv) * * * ;
- (v) * * * ;
- (vi) The expiration of thirty (30) days after the employee reaches maximum medical improvement or concludes or ceases to participate in an approved program of rehabilitation, or one year from the date of injury, whichever is sooner, provided, in the event a petition to establish liability for an injury is filed, but not decided within one year of the date of the injury, within twenty-one (21) days from the first finding of liability. Notwithstanding the foregoing, where the employee is participating in an approved program of rehabilitation specifically designed to provide the employee with the ability to perform a job for which he or she would be eligible under subsection (a) of this section, the right of reinstatement shall terminate when the employee concludes or ceases to participate in the program or eighteen (18) months from the date of injury, whichever is sooner.

Thus, under subdivision (c)(1), the right of reinstatement terminates at various times based on various eventualities — most of which are not quoted above since they are immaterial to the case at bar. Even under the single paragraph quoted above — paragraph (c)(1)(vi) — the right of reinstatement may be determined to cease in five different ways.

ISSUE

The issue before the Court is whether the decision of the Board of Review was supported by reliable, probative, and substantial evidence in the

record or whether or not it was clearly erroneous or affected by error of law. More precisely, was claimant properly ruled monetarily ineligible to receive unemployment benefits based on a determination that his base period could not be backdated to his date of injury?

ANALYSIS

In order to properly decide this case, we need to consider the impact of the two statutes enumerated above. Let us commence by summarizing the particulars of the legal issue before us.

We begin by noting that Mr. Vourvachakis must show that he had received sufficient compensation to meet the Act's earnings requirement during his base period. As a base period is customarily defined, this would be impossible, because Mr. Vourvachakis had been out of work, collecting worker's compensation. However, subsection 28-42-3(3) provides that an applicant for employment security benefits who previously collected worker's compensation benefits may have his or her base period backdated to the date of injury if the applicant's prior position is unavailable.

Pausing momentarily in our analysis, we may note that it is undisputed that Mr. Vourvachakis meets all the foregoing conditions. However, there is one more condition that must be satisfied before we can backdate his base year

and declare him eligible for benefits — he must show he sought to return to his prior job while he was protected by the statutory right to reinstatement established in section 28-33-47. We shall now consider the application of this last condition to Mr. Vourvachakis's circumstance — beginning with the Referee's analysis.

In his Decision, the Referee addressed the question of backdating a base period rather summarily:

The evidence and testimony presented at the hearing establish that the claimant did not reach maximum medical improvement within one year of his injury, he was not eligible for reinstatement under Section 28-33-3(3) of the Rhode Island Worker's Compensation Law, which is a prerequisite for backdating of the base period of his claim under the provisions of Section 28-42-3(3) of the Rhode Island Employment Security Act. Therefore, I find that the claimant does not meet the requirements for backdating his base period to the date of his injury under the above Section of the Act.

Decision of Referee, September 17, 2013, at 1-2. We see that, without expressly quoting the text, the Referee held that an injured worker must reach maximum medical improvement within one year in order to fall under the salutary ambit of paragraph (c)(1)(vi). He therefore found that paragraph (c)(1)(vi) gave Mr. Vourvachakis — who was injured in January of 2010 but did not reach maximum medical improvement until May of 2013 — no relief.

The Referee's understanding of the law may be accurate — insofar as it describes its first sentence of paragraph (c)(1)(vi) — but it entirely ignores and overlooks the second sentence. Although quoted above, for convenience' sake we shall re-quote it here:

* * * Notwithstanding the foregoing, where the employee is participating in an approved program of rehabilitation specifically designed to provide the employee with the ability to perform a job for which he or she would be eligible under subsection (a) of this section, the right of reinstatement shall terminate when the employee concludes or ceases to participate in the program or eighteen (18) months from the date of injury, whichever is sooner.

Thus, under the second sentence of paragraph (c)(1)(vi), a claimant who is participating in a rehabilitation program enjoys the right of reinstatement for up to eighteen months, not a year.

The Referee did not consider whether Mr. Vourvachakis satisfied the terms of this provision, even though he had a duty to address all material issues. See Gen. Laws § 28-44-44. This omission would normally require the instant matter to be remanded to the Board for consideration to be given to the issue. However, I do not believe that additional effort will be necessary in this case.

The record certified to this Court by the Board of Review contains the transcript of the hearing before Referee Palangio. Mr. Vourvachakis stated at that hearing that he went for therapy, apparently at the Dr. John E. Donley

Rehabilitation Center,⁴ through September of 2012, and not thereafter. See Referee Hearing Transcript, at 8. And so, Mr. Vourvachakis' window of opportunity to claim backdating was not extended by his rehabilitation beyond the year period he was otherwise entitled to. See Gen. Laws 1956 § 28-33-47(c)(1)(vi).

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(4). Neither was that decision clearly erroneous in light of the reliable, probative and substantial evidence of record. Gen. Laws 1956 § 42-35-15(g)(5).

Accordingly, I recommend that the decision of the Board be AFFIRMED.

_____/s/_____
Joseph P. Ippolito
MAGISTRATE

February 19, 2014

⁴ The Donley Center is a component of the Department of Labor and Training. See Gen. Laws 1956 § 28-38-19.

